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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 22, ORIGINAL.

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

NICHOLAS DE B. KATZENBACH,
ATTORNEY GENERAL OF THE UNITED STATES,
Defendant.

BRIEF OF THE ATTORNEY GENERAL OF MASSACHUSETTS, AMICUS CURIAE.

Interest of These Amici Curiae.

The above-named Attorneys General join in this brief *amicus curiae* in support of the Voting Rights Act of 1965. The purpose of the Act is to control the *discriminatory* use of literacy and like tests and devices in those few states and localities where they are used as vehicles for preventing Negroes from voting,[1] and to assure that all citizens may exercise the right to vote on equal terms.

[1] Some of the States joining herein have literacy and like tests themselves; some do not. New York joins in this brief and argument only as to the applicability of the Fifteenth Amendment and specifically reserves the question of the applicability of the Fourteenth Amendment to the cases arising under section 4(e) of the

The above-named Attorneys General are convinced that the Act does not offend the Constitution, and that, further, it merits the support of all who believe that the day has passed when denial by a state of the most basic rights inherent in a United States citizen can be tolerated.

At issue is Congress's power to cope with an enforcement problem that has beset it since adoption of the Fifteenth Amendment. By ratifying the Fifteenth Amendment the states determined beyond dispute that no state should have the power to deny or abridge the rights of citizens of the United States to vote because of race or color. Section 2 of the Fifteenth Amendment expressly gave Congress power to enforce its provisions by "appropriate legislation." Yet to this day the provisions of the Fifteenth Amendment have remained a dead letter in a few states; and Negroes in those states have been and still are denied the right to vote, because of their race.

The outcome of this case will determine whether at long last the Fifteenth Amendment is to be given practical effect with adequate, timely methods of enforcement, as opposed to those means which history has proved to be ineffective, too little, and too late.

The above-named Attorneys General believe that Congress may and must take appropriate steps to ensure to Negro citizens everywhere their constitutional right to vote on terms the same as whites. Those who join in this brief do not doubt that each state has the right to establish the qualifications of voters. They would assert and defend such right against improper encroachment. But we are a nation, not just a group of states—and a state's power to determine the qualifications of voters must be exercised in harmony with the standards of the Fifteenth Amendment.

Voting Rights Act of 1965 (*Morgan* v. *Katzenbach*, D.C. D. Col. Nov. 17, 1965; and *United States* v. *County Board of Election of Monroe County*, D.C. W.D. N.Y., Dec. 8, 1965).

The Voting Rights Act of 1965 is intended to abolish the well-documented practice in a few states of using literacy and like tests and devices, *not* to test literacy or maintain reasonable and uniform minimum standards for all voters, but to give local registrars a legalized pretext for turning down all or most Negroes while registering whites. After it became overwhelmingly clear that existing remedies, no matter how vigorously pursued, were inadequate, Congress had no alternative but to frame new legislation to cope with the situation.

Th Voting Rights Act of 1965 reflects a rational, appropriate and measured approach to the problem. It (1) provides for suspending local literacy and like tests and devices in those few states and localities where less than fifty per cent of persons of voting age were actually registered on November 1, 1964; and (2) it provides for federal examiners to register the victims of discrimination in areas where local registrars refuse to register qualified Negroes. Also, it provides for judicial review and for termination of the Act's application wherever discrimination is disproved.

The Act may not reflect the only possible approach. Opinions may differ as to the wisdom of its every detail. But overall, as said, it reflects a rational, appropriate and measured approach to a most difficult problem. It calls for no greater intrusion of federal responsibility than is warranted in the light of experience. As the former Solicitor General of the United States said about the Act:

> "Whether the shift of responsibility [from state to federal] proves great or small in the end depends entirely upon the willingness of the person affected now to conform to the fifteenth amendment's declaration that the right of a citizen to vote shall not be denied or abridged on account of race or color. The bill will have no effect upon the respective functions

of state and federal governments—it will not bring one iota of federal intervention—in those states and localities in which the fifteenth amendment is made a living reality as the Constitution directs. . . ."[2]

Each State joining in this brief has a substantial interest in the ending, within sister states, of a denial of fundamental constitutional rights. This nation's identity and purpose derive from a common allegiance to the Constitution. Denial by any state, solely because of race or color, of a citizen's right to vote affronts the principles which make us one nation. Such denial is a source of damage to every other state.

Today, residents of one state frequently move to another, carrying with them training and attitudes from their former residences. It is of concern to the States joining herein that newly arrived Negro residents will not come from a background of systematic deprivation of their constitutional and political rights. Quite apart from the injustice that such citizens will have suffered, they will be poorly prepared to participate in the democratic process at their new residence. Furthermore, when, under color of law, any state denies to Negroes the right to vote, its action must inevitably lend a facade of respectability to the misguided efforts of those persons in other states who might desire to hamper the efforts of Negro citizens to exercise their legal and constitutional rights. In this fashion the legally established discrimination practiced by a few states serves throughout the country to retard national progress toward full equality and racial harmony. Every state, therefore, is interested in seeing that the rights conferred by the Fourteenth and Fifteenth Amendments are uniformly effective throughout the nation.

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[2] Cox, "Constitutionality of the Proposed Voting Rights Act of 1965," 3 Houston L. Rev. 10.

In addition, our nation's posture abroad suffers if solemn constitutional commitments are in default. Opponents in the international arena use the denial of rights in any state to mischaracterize our entire democracy. In this further respect, the denial of rights in a few states is injurious to all.

And, of course, the composition of our federal government—the men who are elected to national office and our Senators and Representatives—is determined by the composition of the electorate. In a state where less than half the eligible voters are registered, enrollment of now unregistered voters could result in substantial changes both in the individuals representing the state and in the policies they pursue. Such changes could have important effects on national policies influencing all the states. It is plainly of significance to all the states whether the make-up of the Congress reflects all the electorate in certain states or just the white part of it.[3]

For the foregoing reasons, the States joining herein as *amici curiae* have vital interests in this case. It is their deep conviction that the Voting Rights Act of 1965 is not only constitutional but reflects needed action by Congress to secure constitutional rights essential to the vitality and health of the nation.

Summary of Argument.

The Fifteenth Amendment provides that no state shall have power to deny or abridge the rights of citizens of

[3] See also the second paragraph of the Fourteenth Amendment, which specifically provides for a reduction in Congressional representation in the case of states which deny adult citizens the right to vote. This provision clearly gives every other state a direct interest in the extent to which a sister state may discriminate in voter registration.

the United States to vote because of race or color. Congress is given power by section 2 of the Fifteenth Amendment to enforce its provisions by appropriate legislation.

While power to set voting qualifications rests with the states, that power is plainly limited by the guaranties of the Fifteenth Amendment as well, also, as of the Equal Protection clause of the Fourteenth Amendment. Qualifications used to violate these guaranties have been consistently rejected by this Court.

The Voting Rights Act of 1965 is a valid exercise by Congress of its power to enact appropriate legislation to enforce the provisions of the Fifteenth Amendment.

The appropriateness of this Act can be seen by reference to the long history that preceded it and the peculiar problems that it was designed to overcome.

First, the evidence is overwhelming that in certain states there has been and still is widespread, indeed almost universal, calculated denial of Negro voting rights.

Second, the disenfranchisement has been accomplished by use—or rather misuse—of literacy and other tests and devices by local registrars. Such tests and devices (which would ordinarily be legal if equitably and fairly applied to Negroes and whites alike) provide the pretext for rejecting Negroes while registering whites.

Third, prior voting-rights legislation, providing mainly for reinforced judicial, case-by-case remedies, has simply been inadequate to correct the situation.

Faced with this history, Congress was compelled to fashion legislation which would provide for the suspension of tests and devices in those few states where they were being used overtly to disenfranchise Negroes. The Voting Rights Act of 1965 accomplishes this result on a rational basis.

There is precedent for legislation, such as the Act, which uproots otherwise proper practices that have become "infected with abuse," instead of merely attempting to erase

their improper features. In the present case, years of experience, and volumes of testimony and evidence, indicated the impossibility of securing Negro voting rights in certain states without suspending for a period the tests and devices being used to disenfranchise Negroes. That such tests and devices are legal if uniformly administered does not prevent Congress from facing up to their systematically illegal use in some states—and from acting realistically in those states.

The Voting Rights Act of 1965 provides ample safeguards for exempting states and localities with literacy and like tests which are not administered so as to offend the Fifteenth Amendment. The Act is not a bill of attainder, an ex-post-facto law, or other inequitable type of law.

In the light of the facts and circumstances before Congress, it is difficult to conceive of much different—certainly no less encompassing—legislation which would have accomplished Congress's valid aims. If South Carolina's contentions were to prevail, Congress would be placed in the position of being impotent to enforce the guaranties of the Fourteenth and Fifteenth Amendments—a position which the states, no less than the federal government, would find intolerable.

Argument.

I. Congress has Power to Enact Appropriate Legislation Precluding the States from Denying the Right to Vote on the Basis of Color.

A. Although a State has Power to Determine the Qualifications for Voting, Such Power may Not be Used to Violate the Fourteenth and Fifteenth Amendments.

The Fifteenth Amendment provides that no state shall have power to deny or abridge the rights of citizens of the United States to vote because of race or color. A state's

power to determine qualifications for voting[1] is not absolute, but is limited by the Fifteenth Amendment as well as by the Equal Protection clause of the Fourteenth Amendment. Thus Delaware's early attempt to restrict the franchise to whites fell before the Fifteenth Amendment,[2] as did "grandfather clauses" in Oklahoma[3] and Maryland.[4] Attempts to make race a qualification for voting in primary elections have been struck down under the Fourteenth and Fifteenth Amendments. *Smith* v. *Allwright*, 321 U.S. 649. *Nixon* v. *Condon*, 286 U.S. 73. *Nixon* v. *Herndon*, 273 U.S. 536. ". . . [T]he right of suffrage . . . is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 51.

Literacy tests and similar requirements are not exempt from the Fifteenth Amendment. In *Lassiter* v. *Northampton County Board of Elections, supra*, where a North Carolina literacy test was sustained against the contention that "on its face" it violated the Fifteenth Amendment, the Court stated that "a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Id.* at 53. The Court, which in 1949 affirmed a decision annulling Alabama's literacy test on the ground that it was "merely a device to make racial discrimination easy,"[5] in 1965 voided one of Louisiana's literacy tests. *Louisiana* v. *United States*, 380 U.S. 145.

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[1] U.S. Const. art. I, § 2; Amendments X, XVII.

[2] *Neal* v. *Delaware*, 103 U.S. 370.

[3] *Guinn* v. *United States*, 238 U.S. 347.

[4] *Myers* v. *Anderson*, 238 U.S. 368.

[5] *Ibid.*; see *Schnell* v. *Davis*, 336 U.S. 933, affirming 81 F. Supp. 872 (S.D. Ala. 1949).

As these cases have made clear, the States' right to set voting qualifications, exercised "wholly within the domain of state interest . . . is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347. Clearly, then, the States, in exercising their power to determine the qualifications of their voters, may not use otherwise legitimate tests to deprive certain of their citizens of the right to vote.

B. Congress has the Power to Enforce a Negro Citizen's Constitutional Voting Rights by "Appropriate Legislation."

The last sections of the Fourteenth and Fifteenth Amendments give Congress the power to enforce each of these articles by "appropriate legislation." This language was clearly meant to enlarge the power of Congress and to provide for congressional enforcement of the substantive constitutional rights. *Ex parte Virginia*, 100 U.S. 339, 345. Congress's broad powers to enact legislation designed to prevent the denial of the right to vote because of race or color have been sustained in a number of cases. *United States* v. *Louisiana*, 225 F. Supp. 353 (E.D. La. 1963); aff'd, 380 U.S. 145. See *United States* v. *Manning*, 215 F. Supp. 272, 288, n. 38 (W.D. La. 1963); *Larche* v. *Hannah*, 177 F. Supp. 816, 821 (W.D. La. 1959); aff'd, 363 U.S. 420. The Civil Rights Acts of 1957[6] and 1960[7] were upheld.

[6] 71 Stat. 634 (1957), 42 U.S.C. §§ 1971, 1975-1975e, 1995 (1964). The constitutionality of the Act was upheld by the Court in *United States* v. *Thomas*, 362 U.S. 58; *United States* v. *Raines*, 362 U.S. 17; *Larche* v. *Hannah*, 363 U.S. 420.

[7] 74 Stat. 86 (1960), 42 U.S.C. §§ 1971(c), (e), 1974-1974e, 1975d(h) (1964). The constitutionality of this Act was upheld by

This Court has defined the scope of congressional power as follows:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. 339, 345-346.

In construing the powers of Congress under the analogous "necessary and proper" clause[8] the Court has recognized that Congress must necessarily have considerable flexibility in the selection of appropriate means. See *Katzenbach* v. *McClung*, 379 U.S. 294; *Heart of Atlanta Motel, Inc.*, v. *United States*, 379 U.S. 241; *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 420 (1819).

In the present instance Congress has fashioned reasonable and practical means for dealing with longstanding methods employed by certain states to deny Negroes the right to vote, based on misuse of literacy tests and like devices. To understand the appropriateness of Congress's action it is necessary to examine into the history of these abuses and the circumstances with which Congress was confronted. To that history and to those circumstances we now turn.

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the Court in *Louisiana* v. *United States*, 380 U.S. 145; *United States* v. *Mississippi*, 380 U.S. 128; *Alabama* v. *United States*, 371 U.S. 37 (per curiam).

[8] U.S. Const. art. I, § 8.

II. Congress Reasonably Determined on the Basis of Overwhelming Evidence that Negroes in Several States and Political Subdivisions were being Systematically Deprived of the Right to Vote, and that Literacy and Other Tests and Devices were the Chief Means being Used to Accomplish that Result.

Literacy, interpretation and like examinations as a qualification for voting first made their appearance in the Southern states in the 1890's with the purpose, usually explicitly admitted in legislative debate, of disenfranchising the Negro so far as possible.[1] Of Louisiana's tests a federal District Court recently said:

> "These are rooted in the State's historic policy and the dominant white citizens' firm determination to maintain white supremacy in state and local government by denying to Negroes the right to vote." *United States* v. *Louisiana,* 225 F. Supp. 353, 363 (E.D. La. 1963); aff'd, 380 U.S. 145.

The use of the subjective nature of literacy and like tests as a means to bar Negroes from voting has been the most durable of a long series of schemes to deprive colored citizens of their Fifteenth Amendment rights. See *United States* v. *Reese,* 92 U.S. 214; *Ex parte Yarbrough,* 110 U.S. 651; through the "grandfather clause" cases, *Guinn* v. *United States,* 238 U.S. 347; *Myers* v. *Anderson,* 238 U.S. 368; and the "white primary" cases, *Nixon* v. *Herndon,* 273 U.S. 536; *Nixon* v. *Condon,* 286 U.S. 73; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S.

[1] For the history of the Louisiana voting qualification tests, and those of other states in general, see Judge Wisdom's careful study in *United States* v. *Louisiana,* 225 F. Supp. 353 (E.D. La. 1963); aff'd, 380 U.S. 145. See also Cox, "Constitutionality of the Proposed Voting Rights Act of 1965," 3 Houston L. Rev. (1965), 2-3.

461; the resort to procedural hurdles, *Lane* v. *Wilson*, 307 U.S. 268; to racial gerrymandering, *Gomillion* v. *Lightfoot*, 364 U.S. 339; to improper challenges, *United States* v. *Thomas*, 362 U.S. 58; and, finally, the discriminatory use of tests, *Schnell* v. *Davis*, 336 U.S. 933; *Alabama* v. *United States*, 371 U.S. 37; *Louisiana* v. *United States*, 380 U.S. 145.

Aware of this history, Congress established, in 1957, the United States Civil Rights Commission, with broad investigative powers, and directed it to study the extent and circumstances of voting discrimination.

The Commission's studies, taken in conjunction with evidence appearing in litigation, and other reports, confirmed the existence of a widespread and determined effort in certain states to keep Negroes from registering and voting. The evidence of this was overwhelming.[2] In 1961 the Civil Rights Commission concluded that in at least one hundred and twenty-nine counties in ten states, where Negroes constitute more than 5 per cent of the population twenty-one years old and over, less than 10 per cent of those ostensibly eligible were in fact registered to vote. In twenty-three of these counties in five states, indeed, *no* Negroes at all were registered. The inference was unavoidable that some affirmative deterrent was at work, especially in those counties where none were registered.[3]

The Commission also found that literacy and similar tests were the primary means used to prevent Negroes from voting. In 1959 it reported that—

> "In its investigations, hearings, and studies, the Commission has seen that complex voter qualification

[2] See I 1961 United States Commission on Civil Rights Report especially, and also the appendices to H.R. Rep. No. 439, 89th Cong. 1st Sess. (1965).

[3] I 1961 United States Commission on Civil Rights Report, 111-112.

tests, including tests of literacy, education, and 'interpretation' have been used and may readily be used arbitrarily to deny the right to vote to citizens of the United States. *Most denials of the right to vote are in fact accomplished through the discriminatory application and administration of such State laws.* The difficulty of proving discrimination in any particular case is considerable. It appears to be impossible to enforce an impartial administration of the literacy tests now in force in some States, for where there is a will to discriminate, these tests provide the way."[4] (Emphasis added.)

The subjective nature of many of these examinations constitutes their chief value to those who wish to exclude Negroes from the rolls. Wide discretion is often vested in the registrars who evaluate the test results. Review of their determinations is almost impossible. In hearings before the Senate Subcommittee on Constitutional Rights it was testified that "Applicants . . . might have to write long or short statements, interpret complex or simple test materials—all to the satisfaction of the examiner. In the last the opportunities for discrimination are endless . . ."[5] Thus, in a county in one state, for example, a federal district judge found that six Negro applicants (two with master's degrees, three with bachelor's degrees and one with a year of college training) were denied the right to vote on the specious ground that they could not read

[4] 1959 Report, by the United States Commission on Civil Rights: Proposal for a Constitutional Amendment to Establish Universal Suffrage, 144-145.

[5] Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 87th Cong. 2d Sess., on S. 480, S. 2750 and S. 2979, pp. 261-262.

intelligibly or write sections of the state constitution.[6] White applicants, however, have been assisted in completing the forms, and sometimes they have been registered without taking any test.[7]

Also, the Courts have found discrimination by use of qualifying examinations for voting. In *United States* v. *Alabama,* 192 F. Supp. 677 (M.D. Ala. 1961); aff'd, 371 U.S. 37, the District Court found that "The double standard in receiving and processing applications of Negroes and whites has been applied by the Board of Registrars during the past five years in at least six different phases of the registration processes." 192 F. Supp. at 679-680. The decision is virtually a textbook of methods of depriving Negroes of their voting rights, without appearing to do so.[8]

Thus Congress was plainly entitled to conclude, as stated in the Report of the House Committee on the Judiciary:

> "The facts are clear. In widespread areas of several states tests and devices, as defined in this bill,

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[6] *Ibid.*

[7] *Ibid.* 261-262.

[8] The six phases alluded to were (1) the order of accepting applicants (whites were chosen first, no matter when they arrived), (2) the assistance rendered to white applicants (certain whites had been given assistance by the registrars, whereas Negroes of high-school and college education were rejected repeatedly for minor errors, and had not been given any aid); (3) the writing test (Negroes invariably wre required to copy a provision of the Federal Constitution—often article II; whites were given an easier passage, or none at all); (4) grading of applications of Negroes who were rejected because of formal or inconsequential errors, while no whites were rejected for the same errors; (5) the failure to mail registration certificates to Negro applicants (thus the Negroes had no proof of their right to vote, but, if it came to court, the fact of registration would suddenly be "discovered"—see *Mitchell* v. *Wright,* 69 F. Supp. 698 (M.D. Ala. 1947)); (6) the failure to notify rejected applicants (a practice operating only as to Negroes, hampering their reapplication).

have been effectively and repeatedly used to deny or abridge the right of Negroes to vote.'"[9]

The finding that Negroes in several states and political subdivisions were systematically deprived of the right to vote, and that literacy and like tests and devices were the principal means to reach this result, was not only proper, but inescapable.

III. Congress Reasonably Concluded in the Light of Extensive Experience that Case-by-Case Enforcement of Voting Rights under Previous Legislation could Not Cope with the Scale and Dimension of the Problem in Certain States.

A. Prior Voting Rights Legislation was Limited in Scope and Required Case-by-Case Enforcement.

The previous Voting Rights Acts of 1957, 1960 and 1964 enlarged and strengthened the legal remedies available to help individuals illegally denied the right to vote.

Thus the 1957 Act provided for judicial enforcement at the suit of the Attorney General of the right to vote. But the Civil Rights Commission found that "the results of the Act in the field of voting seem disappointing." In 1959 the Commission noted that discriminatory denials of the vote were serious and widespread. The Civil Rights Division had instituted three actions under the new section 1971(c), and had not been successful in any.[1] Partially as a result of this pessimistic report, the 1960 Act was passed.

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[9] H.R. Rep. No. 439, 89th Cong. 1st Sess. 12-13.

[1] I 1961 United States Commission on Civil Rights Report, 75.

Title III of the 1960 Act declared voting records public and required their preservation for a period of twenty-two months following any general or special election. The Attorney General was given the power to secure such records. This provision resulted in complex litigation. See *Alabama* v. *Rogers*, 187 F. Supp. 848 (M.D. Ala. 1960); aff'd, *sub nom. Dinkens* v. *Attorney General*, 285 F. 2d 430 (5th Cir. 1961); cert. den. 366 U.S. 913; *United States* v. *Association of Citizens Councils of Louisiana*, 187 F. Supp. 846 (W.D. La. 1960). Title VI, providing for federal voting referees, was a significant innovation, but a long way from securing the right to vote to Negroes. The machinery for appointing a referee under this title was complicated and time-consuming.

First, the Government had to file a suit under section 1971(a) and (c) and obtain a Court order to the effect that "a person has been deprived on account of race or color" of the right to vote. Then the Court must find that "such deprivation was or is pursuant to a pattern or practice." For at least a year after such a finding, any person in the area of the race found to be discriminated against may apply for an order entitling him to vote. To get such an order he must prove that (*a*) he is qualified under state law to vote, and (*b*) he has since such finding by a Court been (1) deprived of or denied the opportunity to register to vote or otherwise to qualify to vote, or (2) found not to be qualified to vote by any person acting under color of law. After these findings are made, the Court may hear the applicant himself, or appoint referees, who are empowered to act in a fashion similar to a master appointed under Rule 53(c) of the Federal Rules of Civil Procedure. The time-consuming nature of such a process and the difficulties of proof are apparent.

/ Thus the Civil Rights Commission concluded that "These successes (under the 1957 and 1960 Acts), however, do not

indicate that current legislation, even with continued vigorous enforcement, affords a prompt solution to the existence of discriminatory denials of the right to vote on account of race or color. The Government, under present laws, must still proceed slowly—suit by suit, county by county . . . There is no widespread remedy to meet what is still widespread discrimination."[2]

Title I of the 1964 Civil Rights Act expedited suits by prohibiting rejection of applications for immaterial error in filling out forms. It also barred the use of oral literacy tests, and established a rebuttable presumption of literacy flowing from completion of six grades in any school recognized by the state.

But while of value, the 1964 legislation still required judicial enforcement by the traditional case-by-case approach.

B. The Case-by-Case Approach Proved to be Entirely Inadequate to Deal with the Magnitude of the Problem.

Congress, upon examination of results under the previous Voting Rights Acts, reasonably concluded that "experience has shown that the case-by-case approach will not solve the voting discrimination problem."[3] The sheer magnitude of the problem defied a case-by-case solution.

The ineffectiveness of the litigative approach can be seen in the history of voting suits, particularly in the Fifth Circuit.[4] The many opportunities for delay available in any voting-rights lawsuit have all been employed at one point or another by Courts not entirely sympathetic to the vindication of Negroes' rights. For example, the doctrine of abstention has been used extensively. This doctrine post-

[2] I 1961 United States Commission on Civil Rights Report, 100.

[3] Sen. Rep. No. 162, part 2, 89th Cong. p. 6.

[4] See generally, 73 Yale L.J. 90 (1963).

pones litigation in a three-judge District Court until potentially controlling questions of state law have been answered by the state judiciary. Several years may be required to obtain a conclusive ruling if the issue is taken to the state Supreme Court. See *Bailey* v. *Patterson*, 199 F. Supp. 595 (S.D. Miss. 1961); *vacated per curiam*, 369 U.S. 31 (1962) (dealing with a nonvoting civil-rights issue), and *Lassiter* v. *Taylor*, 152 F. Supp. 295 (E.D. N.C. 1957), where the District Court ordered abstention in order that the state Court might consider the challenged statute (a literacy test) "in the light of the provisions of the State Constitution." 152 F. Supp. at 298. See also 73 Harv. L. Rev. 1358, 1364-1365.

Substantial opportunities for delay arise from postponements prior to and during the trial, and from the district judge's control over the period of time between completion of trial and hearing and rendering of his decision. See *Anderson* v. *City of Albany* (No. 20501, 5th Cir. July 26, 1963), in which the judge did not render a decision in two of the cases until nine months after the consolidated hearings. Also see *United States* v. *Lynd*, 301 F. 2d 818, 821 (5th Cir. 1962); *In re Coleman*, 208 F. Supp. 199 (S.D. Miss. 1962); aff'd, *per curiam*, *Coleman* v. *Kennedy*, 313 F. 2d 867 (5th Cir. 1963); cert. den. 373 U.S. 950 (1963) (a demand stalled for more than a year by judicial delays and stays); and see cases cited in 73 Yale L.J. 90, 96.

Delays of the sort mentioned above are compounded when the lower Court errs, requiring appeal, reversal and remand for retrial. Perhaps the most striking example of such "error" may be found in a school segregation case, *Stell* v. *Savannah-Chatham County Board of Education*, 318 F. 2d 425 (5th Cir. 1963), nine years after *Brown* v. *Board of Education of Topeka*, 347 U.S. 483. Here the district judge denied the requested injunctive relief "solely

on the basis" of a factual finding that, although segregation existed, integration was injurious to members of both races. 318 F. 2d at 427. See also *Kennedy* v. *Bruce,* 298 F. 2d 860 (5th Cir. 1962), which was a suit to require the production of county voting records. There the judge rendered decisions, without opinion, denying the request about sixteen months after it was made. 298 F. 2d at 862. For a recent case in which the findings would seem to have been contradicted by the facts, see *United States* v. *Duke,* 332 F. 2d 759 (1964).

And even after the decision of the District Court has been reversed and remanded, it has still other means of slowing down the redress of constitutional wrongs. Four stay orders were used in *Meredith* v. *Fair,* 7 Race Rel. L. Rep. 741, 742-745 (5th Cir. July-August, 1962). The district judge may extend the period prior to framing an injunction to several months, rather than the several weeks normally required. Or the district judge may enter a decree "misinterpreting" the opinion from the Court of Appeals, and delay full relief while modification is sought. The suit may ultimately be abandoned through sheer fatigue of the petitioners. See *Meredith* v. *Fair, supra,* and comments in 73 Yale L.J. 90, 98.

The failure of case-by-case enforcement under prior voting legislation to bring about substantial improvement in the problem as a whole has been shown by statistical results. For example, in Mississippi in ten years the percentage of voting-age Negroes who were on the rolls had crawled from 4.4 per cent to 6.4 per cent (and from 1961 to 1964, the period of greatest litigative activity, it had risen from 6.2 per cent to 6.4 per cent). In Louisiana the registration of Negroes appears to have increased by only one tenth of 1 per cent between 1958 and 1965.[5]

[5] Senate Hearings, Report No. 162, part 2, p. 6. See Christopher, "The Constitutionality of the Voting Rights Act of 1965," 18 Stanford L. Rev. 7-9.

Thus Congress's decision that a more comprehensive approach was needed if Negroes were ever to be given their rights under the Fourteenth and Fifteenth Amendments was not only proper but inescapable.

IV. In the Light of the Magnitude and Nature of the Problem, and its Failure to Yield to Past Case-by-Case Procedures, the Comprehensive Approach of the Civil Rights Act of 1965 is a Reasonable and Appropriate Exercise of Congressional Power.

A. The Presumption Created by Section 4(b) of the Voting Rights Act of 1965 is Reasonable.

The main feature of the Voting Rights Act of 1965 is to substitute a rebuttable administrative presumption of discrimination in an entire state or subdivision thereof for proof of the same case by case (§ 4(b)). The presumption then results in suspension of all literacy and like tests and devices, and permits federal voting examiners to register voters if local registrars continue to discriminate. The rebuttable presumption arises wherever fewer than 50 per cent of the population twenty-one years of age and older has not registered or voted in the 1964 presidential election, and wherever there is in effect a "test or device."[1]

Congress had ample evidence justifying the legislative formula that invokes this presumption. The evidence indicated that voting discrimination was widespread in all but one of the seven states which would fall within the formula. Judicial findings of violations of the Fifteenth Amendment through the use of tests and devices in most of the included states and subdivisions were buttressed by findings of a "pattern or practice" of discrimination. No voting discrimination case initiated by the Justice De-

[1] Section 4(b).

partment within the included states and subdivisions had been concluded without a finding of discrimination. In the counties in Alabama, Mississippi and Louisiana where suits had been instituted, a pattern emerged of a substantial non-white voting-age population, a high percentage of white registration, a very low percentage of non-white registration, and a low voter turnout in the presidential election of 1964. In the six southern states which would be included, a general public policy of racial segregation was evidenced by state statutes regarding travel, education and hospital facilities. Only two states, besides those six, having "tests and devices" also had laws indicating policies of racial discrimination. In one of these, North Carolina, thirty-four counties would apparently be covered by the formula, and in the other, Delaware, recent legislation reflects abandonment of legalized discrimination.

On the other hand, in most states with tests or devices where *more* than 50 per cent of the voting-age population voted in 1964, there are statutes affirmatively outlawing racial discrimination. Congress justifiably concluded that, since those states expressed a public policy against racial discrimination, it was reasonable to assume that voting discrimination on account of race did not exist in quantity.

There are a few areas, of course, covered by the mechanical formula of section 4 which plainly do *not* discriminate (for example, Aroostook County, Maine), but they are afforded the opportunity to exempt themselves by Court action,[2] and, indeed, the Attorney General is directed to consent to entry of a judgment exempting such a state or locality (§ 4(a), (d)).

In view of the evidence before it, Congress could appropriately find, as it did, that, where these two factors (less than 50 per cent registered or voting, and a literacy or like

[2] H.R. Rep. No. 439, 89th Cong. p. 14.

test) are present, there is good reason to presume, subject to rebuttal, that racial discrimination exists.[3]

Inevitably, a mechanical formula of this nature may fall short of perfection in a minority of the circumstances to which it applies. Some areas that discriminate will escape. A few that do not may conceivably be put to the trouble of legal proceedings. But there is a rational connection between the presumption and the "triggering" facts (viz., less than 50-per-cent registration); means for avoiding the presumption are provided; and years of experience demonstrate that only legislation of this scope can deal realistically with the problem.

Moreover, in analyzing the reasonableness of the presumption, one must weigh the burden that it imposes against the greater right that is at stake. The most that can happen to a state is to lose, temporarily, its right to establish tests and devices as a qualification to vote. In return for this, the right of its citizens to vote without discrimination is vindicated.

It should be repeated that the Act's restrictions do not apply if a state or political subdivision (although otherwise within the formula) can show that it has not discriminated against Negro voting applicants in the last five years. The burden is a reasonable one; it requires a showing that, for the preceding five years, no test or device has been used to deny the right to vote on account of race or color, and that any incidents of discrimination have been few in number, promptly corrected, and are unlikely to recur in the future.[4] The burden of proof falls on the

[3] H.R. Rep. No. 439, 89th Cong. 1st Sess. 13. Sen. Rep. No. 162, part 3, p. 13.

[4] Sections 4(a) and (d). The fact that no declaratory judgment may be obtained if, within the last five years, a court has entered a judgment holding that the state or subdivision has engaged in the discriminatory use of tests simply is a form of col-

proper party, inasmuch as the greatest part of the relevant evidence is in the hands of the states or subdivisions involved.

Clearly, the presumption under section 4 of the Act is sufficiently reasonable in the light of past experience and the problem at hand to fall within the authority granted Congress to enact "appropriate legislation" to enforce the provisions of the Fourteenth and Fifteenth Amendments.

B. There is Precedent for Suspending Otherwise Proper Tests and Devices where they have Become Infected with Abuse.

The suspension for a period of time of otherwise proper literacy and like tests and devices in states and subdivisions where they are being used for illegal purposes does not exceed Congress's power. There is precedent for legislation which uproots otherwise legal practices that have become so infected with abuse that it is impractical simply to isolate and erase their improper features.

Thus, for some years the National Labor Relations Board has disestablished company unions instead of merely enjoining company domination or interference. This practice was upheld in *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 250, per Roberts, J.:

> "As pointed out in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, disestablishment of a bargaining unit previously dominated by the employer may be the only effective way of wiping the slate clean and affording the employes an opportunity to start afresh in organizing for the adjustment of their relations with the employer."

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lateral estoppel; the political entity cannot now claim that it has not done what it has already been found to have done.

In both situations the interest of innocent persons may be subordinated for a time to the securing of the larger interest—there the interest of employees who might wish to support the union theretofore dominated was subordinated; here that of the literate voters who may object to possibly illiterate voters sharing in the suffrage.

In *James Everard's Breweries* v. *Day,* 265 U.S. 545, Congress was permitted to prohibit the prescription of malt liquors for medical purposes, and was not limited to regulating the misuse of the prescriptions. The Court said, at pages 558-559:

> ". . . Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished . . ."

In the last analysis, the appropriateness of any legislation depends on the peculiar facts and circumstances with which Congress must deal. Seldom has Congress had a longer history or more conclusive documentation upon which to base its action. The failure of earlier case-by-case attempts, and the fact that so little has been accomplished over so long a period, underscored the necessity for the more comprehensive action which Congress finally took. (Compare *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543, pointing out the decisive effect of new, or newly disclosed, facts on an earlier constitutional decision.)

Whatever the Court's judgment might have been as to the appropriateness of the Act had it been enacted, say, in 1871, there can be little doubt as to its appropriateness nearly a century later in the light of intervening experience and the facts and evidence at hand.

V. The Act is Not a Bill of Attainder, Ex-Post-Facto Law, or Other Type of Unreasonable or Improper Legislation.

Arguments that the Act is a bill of attainder, or an *ex post facto* law, and that it infringes upon the states' rights to equal treatment, deserve summary treatment. There is nothing in the evils against which the bill of attainder and *ex post facto* law clause[1] are directed, or in the cases which have construed it, to indicate that the protection was designed to apply to the states. As to the states' rights to equal treatment, *Coyle* v. *Smith*, 221 U.S. 559, makes clear that this "equal footing" doctrine applies only to the basis on which a state is admitted to the Union.

Even if states were entitled to protection against bills of attainder and *ex post facto* laws, the Act does not fall into either category, for it imposes no punishment. *Cf. Cummings* v. *State of Missouri*, 4 Wall. 277. A presumption general in its terms, founded on substantial experience, and subject to dissolution in a judicial proceeding, is in no event a bill of attainder. It is well established that even in criminal cases the burden of proving certain facts can be shifted to the defendant without violating his constitutional rights. *Casey* v. *United States*, 276 U.S. 413, 418. *Morrison* v. *California*, 291 U.S. 82, 88. *Cases* v. *United States*, 131 F. 2d 916 (1st Cir. 1942); cert. den. *sub nom. Velazquez* v. *United States*, 319 U.S. 770; reh. den., 324 U.S. 889.

Hawker v. *New York*, 170 U.S. 189 (1898), supports the authority of Congress to impose present sanctions on the basis of a past judicial finding of illegal conduct. There a New York statute made a criminal conviction, even prior to passage of the law, conclusive evidence of unfitness to serve as a doctor; here the suspension of literacy

[1] U.S. Const. art. I, § 9.

tests in section 4 may be affirmed on the basis of a judicial finding of illegal voting dicrimination made prior to as well as after enactment of the Act.

Arguments that the Act operates "retroactively" or is based on a "legislative trial" are frivolous: all regulatory legislation must be based on legislative findings as to antecedent facts. Such legislation has been consistently upheld where reasonable and where there is "some rational connection between the fact proved and the ultimate fact presumed, and . . . the inference of one fact from proof of another . . . [is not] so unreasonable as to be a purely arbitrary mandate." *Mobile, Jackson & Kansas City Railroad Co.* v. *Turnipseed*, 219 U.S. 35, 43. *Cf. Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U.S. 559, 571. *Reynolds* v. *United States*, 292 U.S. 443, 449. *Porter* v. *Senderowitz*, 158 F. 2d 435, 440 (3d Cir. 1946); cert. den. *sub nom. Senderowitz* v. *Fleming*, 330 U.S. 848. *Dunn* v. *Grisham*, 157 So. 2d 766, 769-770 (1963) (S. Ct. Miss.). Black, Constitutional Prohibitions, § 179 (1887 ed.). See also *Guaranty Trust Co.* v. *Henwood*, 307 U.S. 247; *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U.S. 240.

Admittedly the Act establishes a presumption which, like all legislative presumptions, has a quality of arbitrariness. The Legislature has to draw lines at some point, and one can always argue in a given instance that the line should have been drawn at some slightly different point. However, so long as the legislation is reasonable and rational, it is for the Legislature, not the Court, to draw the lines.

Given the facts and circumstances of the situation and the widespread refusal of certain states to abide by the Fourteenth and Fifteenth Amendments, Congress has acted reasonably and discreetly, and in a manner consistent with a due regard for the rights of all the states.

Conclusion.

The right of all United States citizens to vote on equal terms, without reference to their race or color, is such an ingrained, accepted part of the system of values under which modern Americans live that it is incomprehensible, in the year 1965, to realize that in a few states this right is still not acknowledged. The Voting Rights Act of 1965 is a reasonable effort by Congress, after years of frustration and failure, to carry out the clear mandate of the Fifteenth Amendment. We respectfully urge the Court to uphold the constitutionality of said Act.

Respectfully submitted,

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